No. 20544

In the

United States Court of Appeals

For the Ninth Circuit

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION and UNITED STATES OF AMERICA,
Respondents.

Opening Brief of Petitioner Stockton Port District

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A.

The Court's Jurisdiction

This proceeding involves a petition to review and set aside, in part, a final order of the Federal Maritime Commission (hereinafter referred to as the Commission) entered under authority of the Shipping Act, 1916 (46 U.S.C. 801 et seq.). Petitioner Stockton Port District was the complainant in the proceeding before the Commission and, as is explained hereinafter, has been aggrieved by the Commission's order.

Sections 2 and 4 of the Review Act of 1950 (5 U.S.C. 1032, 1034) give the United States Court of Appeals exclusive jurisdiction to review such a final order pursuant to a petition filed by a party aggrieved by the order. Jurisdiction herein is based on such statutory provisions.

Venue herein is based on Section 3 of the Review Act of 1950 (5 U.S.C. 1033), which provides that the venue of such a proceeding shall be in the judicial circuit wherein the petitioner has its residence or principal office. Petitioner Stockton Port District is a public corporation whose principal place of business and principal office are located at Stockton, California, in the Ninth Circuit.

B.

Statement of the Case

The decision of the Commission here under review will, unless set aside by the Court, have a far-reaching disastrous effect on various ports throughout the United States. The "port equalization" device which has been approved by the Commission's decision permits steamship lines to use a port developed with Government funds for rate-making purposes and to deprive it of cargo which it would otherwise receive by diverting the cargo to another port for loading by means of a rebate to the shipper of part of his inland transportation charges.

By approving the device of "port equalization" the Commission's decision gives the Conference steamship lines, and indeed even foreign steamship lines, the power to determine which ports in the United States shall prosper and which shall be deprived of cargo that they would normally receive—in direct opposition to the expressed Congressional policy of encouraging the use by vessels of ports for cargo

which would naturally pass through them*, and in spite of the expenditure of millions of dollars of Government funds toward the development of the ports which will be adversely affected.

Petitioner Stockton Port District is a public corporation organized under the laws of the State of California and is a political subdivision. Petitioner and the City of Stockton, California, a municipal corporation, own the wharves and other facilities comprising the Port of Stockton, which are operated by petitioner. The Port of Stockton is located in the San Joaquin Valley 84 miles by water from the Golden Gate. (Rep. Tr. 8, 30, Phelps.)†

On or about December 27, 1962, petitioner filed a complaint with the Federal Maritime Commission pursuant to the Shipping Act, 1916, (46 U.S.C. 801 et seq.), in which the Pacific Westbound Conference, the Pacific Straits Conference, the Pacific/Indonesian Conference, and the individual members of such Conferences were named as respondents. Such Conferences are voluntary associations of steamship lines operating pursuant to agreements approved by the Commission or its predecessor under Section 15 of the Shipping Act, 1916 (46 U.S.C. 814). The complaint before the Commission was entitled Stockton Port District v. Pacific Westbound Conference, et al., and was assigned Docket No. 1086.

In its complaint before the Commission petitioner alleged that certain provisions of the tariffs of such Conferences and their members which permit "port equalization", and the practices of the Conferences and their members with

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*See Section 8 of Merchant Marine Act, 1920, (46 U.S.C. 867).

†References to the testimony of witnesses before the Commission in the Reporter's Transcript will be cited in this manner. Such Reporter's Transcript is the first document set forth in the Court Record and the page numbers of the Reporter's Transcript are the same as the pages of the Court Record.

respect to port equalization against the Port of Stockton, are unlawful on various grounds which are discussed hereinafter.

Port equalization is a device whereby, instead of loading cargo at the port nearest the origin of the cargo, an ocean carrier diverts the cargo to a more distant port for loading by paying the shipper a rebate equal to the difference in his inland transportation charges to the respective ports. Under port equalization the shipper's inland transportation charges are, by means of such rebate by the ocean carrier, made the same to the port at which the cargo is loaded as the inland transportation charges which the shipper would have incurred if the cargo had moved over the port to which the lowest inland transportation charges apply from the point of origin of the cargo.

Under the practice of port equalization in which these Conferences and their members engage, for example, if the inland transportation charge from Fresno, California, to the Port of Stockton on certain cargo is 20 cents per 100 pounds, and the corresponding charge to San Francisco, California, is 30 cents, the ocean carrier members of these Conferences are permitted by their tariffs to load, and do load, such cargo at San Francisco and pay 10 cents per 100 pounds of the shipper's inland transportation charges to San Francisco, so that the shipper's inland transportation charges will be the same as though his cargo had been loaded at the port to which the lowest inland transportation charges apply, which is Stockton.

The effect of such port equalization is to deprive the Port of Stockton of a substantial volume of cargo which would move over that port in the absence of the port equalization. To the extent that such cargo would have moved over the Port of Stockton without the port equalization, that port

has lost revenue from terminal charges on such cargo which it would otherwise have received. (See Commission's Report, page 5, R. 1270.)* Information supplied by the Conferences shows that in 1962—the latest year available—a total of 47,529 tons of cargo was equalized against the Port of Stockton by the members of these Conferences. (Ex. 11-14.) The Commission found that "Without equalization much of the cargo would move through Stockton". (Com. Rep. 7-8, R. 1272-73.) Of the 47,529 tons equalized against the Port of Stockton in 1962, 1,400 tons moved over the Ports of Los Angeles and Long Beach, and the balance of 46,129 tons moved over San Francisco Bay ports, nearly all over San Francisco. (Ex. 11-14.) Of the total of 47,529 tons equalized against Stockton, 44,136 tons moved via members of the Pacific Westbound Conference and 3,393 tons via members of the Pacific Straits and Pacific/Indonesian Conferences. (Ex. 11-14.)

The port equalization rules of the Conferences here involved are set forth as Appendix A hereof in the same form in which they were set forth as Appendix A of the Commission's Report, with the portions relating particularly to the Port of Stockton being underscored as underscored by the Commission.

In and by its Report and Amended Order† in Docket No. 1086, the Commission found and concluded that the port equalization rules of these Conferences and their members, and practices in accordance therewith, are *unjustly discriminatory and unfair* to the Port of Stockton and ports

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*The pages of the Commission's Report will be cited as "Com. Rep. 5" etc. References to the Transcript of the Record before the Court will be cited as "R. 1270" etc. Exhibits will be cited as "Ex.").

†The "Amended Order" will be referred to herein as "the Order". It superseded the original Order and is the same as the original Order, except that it includes a performance date which was left blank in the original order.

on San Francisco Bay, and hence in violation of Section 15 of the Shipping Act, 1916, (46 U.S.C. 814), to the extent that they provide for equalization of inland transportation against the Port of Stockton and ports on San Francisco Bay *on cargo loaded at Los Angeles and Long Beach, California.*

The majority of the Commission found and concluded, however, that the port equalization rules and practices of the Conferences involved and their members are *not unlawful* in the case of port equalization against the Port of Stockton *on cargo loaded at San Francisco or any other port located on San Francisco Bay.** This distinction between cargo loaded at Los Angeles and Long Beach and at a port located on San Francisco Bay was based on the unsupportable and completely irrelevant grounds (a) that Stockton and San Francisco are both San Francisco "bay area" ports and consequently are both in the same "geographical area", and (b) that the area which is "naturally" tributary to Stockton is also "naturally" tributary to San Francisco.

The dissenting report of Commissioner Hearn condemns the decision of the majority of the Commission because it results in "(1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer." (Com. Rep. 28, R.

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*The Commission's Report was issued by three of the five Commissioners. It was accompanied by a dissenting opinion of Commissioner Hearn, who concurred in the conclusion that port equalization against Stockton on cargo loaded at Los Angeles and Long Beach is unlawful, but who dissented vigorously with respect to the conclusion that port equalization against Stockton on cargo loaded at a San Francisco Bay port is lawful. The Commission's Report states (page 33, R. 1299) that Commissioner Patterson "concurs in the result" and will issue a supplemental report. His supplemental report was issued after the Petition for Review herein was filed, namely on January 21, 1966.

1294.) *The dissenting report also concludes that Stockton is not a San Francisco Bay area port, that cargoes naturally tributary to Stockton are not "naturally" tributary to San Francisco, and that undue prejudice against the Port of Stockton results from the fact that most of the cargo which is equalized against Stockton and loaded at San Francisco would move via Stockton in the absence of the equalization.* (Com. Rep. 30-32, R. 1296-98.) *The dissenting report holds that "the subject equalization rules against Stockton are violative of Section 16 First of the Shipping Act, contrary to the public interest standard of Section 15, and in contravention of the principles and policies of Section 8 of the Merchant Marine Act, 1920, and Section 205 of the Merchant Marine Act, 1936."* (Com. Rep. 27A-28, R. 1293-94.)

This Petition for Review is directed toward the failure of the Commission to conclude that the port equalization here involved against the Port of Stockton on cargo loaded at San Francisco or any other port on San Francisco Bay is unlawful, and the Commission's failure to order the Conference tariff rules amended accordingly.

C.

Specification of Errors

The errors in the Commission's Report and Order which are relied upon by petitioner are as follows:

1. The Federal Maritime Commission (the Commission) erred in concluding that port equalization against the Port of Stockton as practiced by the respondents before the Commission on cargo loaded at San Francisco or any other port located on San Francisco Bay is lawful.

2. Having concluded that port equalization against the Port of Stockton on cargo loaded at Los Angeles

and Long Beach is unlawful (Com. Rep. 25-27A, R. 1290-93), the Commission erred as a matter of law in failing to conclude that port equalization against the Port of Stockton on cargo loaded at San Francisco or any other port located on San Francisco Bay is likewise unlawful.

3. The Commission's finding and conclusion that Stockton and San Francisco are both San Francisco "bay area" ports and are both in the same "geographical area" (Com. Rep. 12, R. 1277) are unsupported by substantial evidence.

4. The Commission's finding and conclusion that the territory which is "naturally" tributary to Stockton should properly be considered "naturally" tributary to San Francisco and other San Francisco Bay area ports (Com. Rep. 16, R. 1281) are unsupported by substantial evidence.

5. The Commission's conclusion that "the territory surrounding Stockton and the entire Bay area is centrally, economically and naturally served by the conference facilities at San Francisco" (Com. Rep. 16, R. 1281) is unsupported by adequate findings and unsupported by substantial evidence.

6. Even if it could be said that Stockton and San Francisco are both "bay area" ports and are both in the same geographical area, and that the area which is naturally tributary to Stockton is also naturally tributary to San Francisco, the Commission erred as a matter of law in concluding that those factors preclude unfairness, unjust discrimination and undue prejudice against Stockton and a violation of the policy of Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867), and in failing to conclude that the legal issue involved in determining whether such violations

of law result from port equalization is whether the equalization results in the movement via San Francisco of cargo that would move via Stockton if it were not for the equalization.

7. Having found that "Without equalization much of the cargo would move through Stockton" (Com. Rep. 7-8, R. 1272-73), the Commission erred as a matter of law in failing to find and conclude that port equalization by the respondents before the Commission results in unfairness, unjust discrimination and undue prejudice against Stockton on cargo loaded at San Francisco and other ports on San Francisco Bay, in violation of Sections 15 and 16 (First) of the Shipping Act, 1916, (46 U.S.C. 814, 815), and violates the policy of Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867), and is hence contrary to the public interest and in violation of Section 15 of the Shipping Act, 1916, (46 U.S.C. 814).

8. Having found that "if there were no equalization, many perishable commodities would still move through San Francisco rather than Stockton" (Com. Rep. 8, R. 1273) and that "not all the equalized cargo would have gone to Stockton but for equalization" (Com. Rep. 14, R. 1279), the Commission erred as a matter of law in failing to conclude that port equalization against the Port of Stockton on cargo loaded at San Francisco and other ports on San Francisco Bay results in rebates by the respondents before the Commission to shippers whose cargo would move via a San Francisco Bay port in the absence of such port equalization, in violation of Section 16 (Second) of the Shipping Act, 1916, (46 U.S.C. 815).

9. The Commission erred as a matter of law in concluding that port equalization against Stockton on

cargo loaded at a port on San Francisco Bay is not contrary to the public interest, in violation of Section 15 of the Shipping Act, 1916, (46 U.S.C. 814), because it is beneficial to shippers and the carriers which equalize against Stockton (Com. Rep. 20-22, R. 1285-87), and in failing to conclude that it is contrary to the public interest, in violation of said Section 15, because it is detrimental to the Port of Stockton and to carriers which serve or desire to serve Stockton.

10. Having found that "Although equalization is optional under the tariff, carriers find that competition compels them to equalize" (Com. Rep. 8, R. 1273), the Commission erred as a matter of law in failing to conclude that port equalization as practiced by the respondents before the Commission against the Port of Stockton on cargo loaded at a San Francisco Bay port prevents a respondent from serving the Port of Stockton as its managerial judgment dictates, in violation of Section 205 of the Merchant Marine Act, 1936, (46 U.S.C. 1115).

11. The Commission erred as a matter of law in concluding that the prior decisions support its position.

12. The Commission erred as a matter of law in concluding (Com. Rep. 23, R. 1288) and ordering (R. 1301, 1305) that the respondents before the Commission should remove the language "which would normally move" from the rule, since the Commission's interpretation of such language is unsupported by substantial evidence and since this will result in a clear rebate to shippers who would move their cargo via San Francisco without any equalization, in violation of Section 16 (Second) of the Shipping Act, 1916, (46 U.S.C. 815).

13. The Commission's conclusions with respect to the lawfulness of equalization against Stockton on

cargo loaded at San Francisco or any other port on San Francisco Bay are based on findings which are unsupported by substantial evidence, and on errors of law, and are unsupported by adequate findings.

14. The Commission's Amended Order served on September 28, 1965, (R. 1304-05), is unlawful to the extent that it fails to conclude that port equalization against the Port of Stockton on cargo loaded at San Francisco or any other port on San Francisco Bay is unlawful, in violation of Sections 15 and 16 (First) and (Second) of the Shipping Act, 1916, (46 U.S.C. 814, 815), of the policy declared in Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867), and of Section 205 of the Merchant Marine Act, 1936, (46 U.S.C. 1115), and to the extent that it fails to order the respondents before the Commission to cease and desist from applying their equalization rules to such cargo and to modify their equalization rules to exclude their application to cargo loaded at such ports which is equalized against the Port of Stockton.

15. The Commission's Report and Amended Order are arbitrary, capricious, and an abuse of the Commission's power and discretion to the extent that they fail to conclude that port equalization against the Port of Stockton on cargo loaded at a port located on San Francisco Bay is unlawful.

16. The Amended Order served on September 28, 1965, deprives petitioner Stockton Port District of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that it improperly permits the respondents before the Commission to deprive petitioner of revenue which it would receive in the absence of the port equalization.

D.

Argument

I.

SUMMARY OF ARGUMENT

Petitioner's argument may be summarized briefly as follows:

1. Violation of Policy of Section 8 of Merchant Marine Act, 1920.—Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867), expresses a Congressional policy of encouraging the use by vessels of ports for cargo which would naturally pass through them.* The Commission's decision violates this policy in two respects: First, by approving the "port equalization" against the Port of Stockton on cargo loaded at San Francisco or any other port on San Francisco Bay, the decision permits ocean carriers to divert from the Port of Stockton cargo which would naturally pass through that port except for the rebate paid to the shipper for sending his cargo to a port other than Stockton. Second, in considering the public interest, the Commission's decision (Com. Rep. 20-22, R. 1285-87) considers only the interest of shippers and of the ocean carriers which equalize against Stockton instead of sending their vessels to Stockton, and disregards completely the interest of the Port of Stockton and of ocean carriers which serve or desire to serve Stockton, and the detrimental effect on such port and carriers. The port equalization which has been approved in violation of such Congressional policy in these two respects is therefore contrary to the public interest and in violation of Section 15 of the Shipping Act, 1916, (46 U.S.C. 814).

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*The provisions of all of the statutes which are relied upon by petitioner in support of its position are set forth in Appendix B of this Brief.

2. Violation of Section 205 of Merchant Marine Act, 1936—Section 205 of the Merchant Marine Act, 1936, (46 U.S.C. 1115), makes it unlawful for any conference or ocean common carriers to prevent any other such carrier from serving any port of the type of the Port of Stockton. Port equalization as practiced by the Conference carriers here involved against the Port of Stockton on cargo loaded at a San Francisco Bay port prevents such carriers from serving the Port of Stockton as their managerial judgment dictates. This constitutes a violation of Section 205 by the Conferences which maintain the port equalization rules in their tariffs.

3. Rebate in Violation of Section 16 (Second) of Shipping Act, 1916.—Some of the equalization payments under consideration are made to shippers whose cargo would move via a San Francisco Bay port *even if there were no equalization.* Such equalization payments constitute an unlawful rebate, in violation of Section 16 (Second) of the Shipping Act, 1916, (46 U.S.C. 815).

4. Unfairness, Unjust Discrimination and Undue Prejudice Against Port of Stockton.—The Commission correctly concluded that when the inland transportation rate from the origin of the cargo, such as Fresno, is less to Stockton than to Los Angeles and Long Beach, port equalization by the respondent Conferences and their members against the Port of Stockton on such cargo when it is loaded at Los Angeles or Long Beach is unlawful, since it deprives Stockton of cargo which would move over that port in the absence of such equalization. Such port equalization was held to be unjustly discriminatory and unfair between ports, in violation of Section 15 of the Shipping Act, 1916, (46 U.S.C. 814). (Com. Rep. 25-27A, R. 1290-93.)

Yet when the inland transportation rate on the same cargo from the same point of origin is less to Stockton than

to San Francisco and the cargo is loaded at San Francisco, the majority of the Commission has held that port equalization against Stockton is entirely lawful, even though the cargo would have moved over the Port of Stockton in the absence of such equalization and the equalization deprives Stockton of the cargo.

What are the reasons given by the majority of the Commission for such obviously inconsistent conclusions? First, that Stockton and San Francisco are both San Francisco "bay area" ports and are hence both in the same "geographical area". (Com. Rep. 12, R. 1277.) And second, that the territory which is "naturally" tributary to Stockton should properly be considered "naturally" tributary to San Francisco and other ports on San Francisco Bay. (Com. Rep. 16, R. 1281.) Commissioner Hearn has registered a vigorous dissent to this completely unfounded distinction between cargo loaded at Los Angeles and cargo loaded at San Francisco. (Com. Rep. 27A-33, R. 1293-99.)

We shall show that this attempted distinction in port equalization against Stockton on cargo loaded at San Francisco and at Los Angeles is wholly unsupported in fact and in law. Having correctly concluded that port equalization against Stockton on cargo loaded at Los Angeles and Long Beach is unlawful, the Commission should have concluded that port equalization against Stockton on cargo loaded at San Francisco or any other port located on San Francisco Bay is likewise unlawful.

These respective grounds of unlawfulness of the port equalization against the Port of Stockton on cargo loaded at a San Francisco Bay port will be discussed in the order stated. In such discussion we shall show that the conclusions of the Commission to the contrary are based on findings and conclusions which are unsupported by substantial

evidence, and on errors of law, and are unsupported by adequate findings. We shall likewise show that the Commission's conclusion (Com. Rep. 23, R. 1288) and order (R. 1301, 1305) that the language "which would normally move" over another port be removed from the equalization rule is based on findings which are unsupported by substantial evidence and on an error of law. Finally, it will be shown that the Commission's Order deprives petitioner of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, by improperly permitting the respondents before the Commission to deprive petitioner of revenue in the form of terminal charges which it would receive from cargo that would move over the Port of Stockton in the absence of the port equalization.

Annexed to this Brief as Appendix C is a table showing page references to the record where exhibits presented before the Commission were identified, offered and received or rejected as evidence.

II.

VIOLATION OF POLICY OF SECTION 8 OF MERCHANT MARINE ACT, 1920

The Commission's decision violates the policy expressed by Congress in Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867), in two respects, which will be discussed separately.

a. Diversion of Cargo from Port of Stockton.

We have seen that 47,529 tons of cargo were equalized by the respondent Conference lines against the Port of Stockton in 1962, and that of this amount 46,129 tons moved over ports located on San Francisco Bay. (Ex. 11-14.) The

Commission has found that "Without equalization much of the cargo would move through Stockton". (Com. Rep. 7-8, R. 1272-73.) Moreover, the respondent Conferences' equalization rules* allow equalization only under the following circumtances:

> "* * * cargo *which would normally move* from one California terminal port, may be shipped under equalization via another California terminal port." (See paragraph (e) of Appendix A hereof. Emphasis supplied.)

The equalization rules and practices which have been approved by the Commission, therefore, clearly decrease and discourage the use of the Port of Stockton for cargo that would otherwise normally and naturally pass through that port.

In the case of *Pacific Far East Line v. United States,* 246 F. (2d) 711 (C.A., D.C. 1957) the United States Court of Appeals upheld a decision of the Federal Maritime Board in *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955), which held that port equalization against ports in Oregon and Washington on certain products loaded at California ports was "unjustly discriminatory and unfair as between ports within the meaning of Section 15 of the Act and detrimental to the United States *as contrary to the principles of Section 8 of the Merchant Marine Act*" (emphasis supplied), since it resulted in diversion of traffic which otherwise would naturally pass through the complaining ports. (See 246 F. (2d) 714.) In upholding the Board's decision, the Court relied on the policy of Congress expressed in Section 8 of the Merchant Marine Act, 1920. With respect to Section 8 of that Act the Court said:

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*At times the respondent Conferences before the Commission and their members will be referred to as the "respondent Conferences" or simply the "respondents".

"While we need not decide that this section (conferring the power to investigate) confers power to act to promote ports, *it is indicative of a congressional policy favoring port improvement and development.* That policy having been expressed, *the Board could, if it was not bound to do so, examine the practices here complained of in the light of that policy, and exercise its power to approve or disapprove such practices accordingly.* The Board did consider this policy in determining whether or not to approve equalization as practiced by the Conference. We must therefore conclude that the Board's orders here under attack were authorized and supported by statute." (246 F.(2d) 716. Emphasis supplied.)

In the Board's decision which the Court upheld, the Board, in finding that the equalization violated the principles and policies of Section 8 of the Merchant Marine Act, 1920, commented as follows with respect to that section:

"* * * That section requires, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity to another geographical area. * * *"

"Section 8 charges the Board with the duty to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports." (4 F.M.B. 679.)

Since the Court of Appeals held that Section 8 of the Merchant Marine Act, 1920, was properly applied to condemn the port equalization involved in that case because of the resulting diversion of cargo from the port equalized against, Section 8 should likewise be held to be applicable to condemn the port equalization in the case here under review.

Moreover, the Port of Stockton has been developed by the expenditure of $23,000,000, of which $17,300,000 represents Government funds, including $3,800,000 of Federal funds. (Rep. Tr. 33, Phelps.) In view of Section 8 of the Merchant Marine Act, 1920, it was certainly never the intent of Congress that the welfare of a port—and especially a port developed with Government funds—should be left to the mercy of steamship lines, and even foreign steamship lines, cloaked with authority to divert cargo from such a port by the artificial device of rebates to shippers.*

By diverting cargo from the Port of Stockton to ports on San Francisco Bay, the port equalization here involved produces results directly opposite of promoting and encouraging the use by vessels of a port for freight which would naturally pass through that port—which is the policy expressed by Congress in Section 8. Such port equalization, therefore, results in a clear violation of the principles and policy of Section 8.

The port equalization rules here involved are set forth in the Conference tariffs and are consequently agreements between the member lines. Since such rules specify the circumstances in which the Conference members may apply port equalization, they regulate competition and are cooperative working arrangements between the members. They are therefore within the scope of Section 15 of the Shipping Act, 1916, (46 U.S.C. 814), and are subject to the provisions of that section.

Section 15 of the Shipping Act, 1916, provides that the Commission shall disapprove or cancel any agreement between common carriers by water that it finds "to be con-

*As recently as the year 1965 Congress approved a project for deepening and otherwise improving the waterways to Stockton which will involve the expenditure of approximately $60,000,000. (Public Law 89-298.)

trary to the public interest". Congress has determined in Section 8 of the Merchant Marine Act, 1920, that the use of ports by vessels should be promoted and encouraged for the handling of freight that would naturally pass through such ports. The use of the Port of Stockton by vessels for the handling of cargo that would naturally pass through that port is therefore in the public interest.

Since they decrease and discourage the use of the Port of Stockton by vessels for handling such traffic, in violation of the Congressional policy specified in Section 8 of the Merchant Marine Act, 1920, such equalization rules and practices are, as a matter of law, contrary to the public interest, and the Commission should have ordered the rules cancelled from the Conference tariffs, on the ground that they are agreements between common carriers by water which are contrary to the public interest and hence in violation of Section 15 of the Shipping Act, 1916.

b. Disregard of Section 8 in Determining Public Interest.

The Commission likewise erred in failing to consider the Congressional policy expressed in Section 8 of the Merchant Marine Act, 1920, in its determination of whether the equalization rules and practices are "contrary to the public interest" under Section 15 of the Shipping Act, 1916.

In its Report the Commission concluded that port equalization against the Port of Stockton on cargo moving over a port on San Francisco Bay is not contrary to the public interest because, according to the Commission, it is beneficial to shippers and to the carriers which equalize against Stockton instead of sending their vessels to Stockton. (Com. Rep. 20-22, R. 1285-87.) In reaching this conclusion the Commission completely disregarded the interest of the Port of Stockton and of ocean carriers which serve or desire to serve Stockton.

The Commission found specifically that to eliminate equalization "would be beneficial to the Port of Stockton". (Com. Rep. 20, R. 1285.) In view of Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. 867), the Commission erred in failing to give proper consideration to the interest of the Port of Stockton in determining whether the equalization rules and practices are contrary to the public interest and hence in violation of Section 15 of the Shipping Act, 1916.

In and by Section 8 of the Merchant Marine Act, 1920, Congress (as we have pointed out hereinabove) has determined that it is in the public interest to promote and encourage the use of ports by vessels for the handling of cargo that would naturally pass through such ports. This indicates that in determining what is in the public interest, not only should the interest of such a port—here Stockton—be considered, but also the interest of ocean carriers which serve or desire to serve Stockton by sending their vessels to that port.

The Commission has disregarded this policy laid down by Congress. It has determined wherein the public interest lies by considering only the interest of certain shippers and of ocean carriers who, by means of equalization, are able to defeat the desires of Congress by avoiding sending their vessels to Stockton and still handling cargo that would otherwise move over the Port of Stockton. As the dissenting opinion of Commissioner Hearn states,

> "At least one conference carrier has provided substantial scheduled service at the Port of Stockton. The majority's action today will bless the efforts of those carriers who have no intention of giving direct service to the port, and those carriers who have traditionally bypassed the port, with the opportunity to drain its general cargo. * * *" (Com. Rep. 29, R. 1295.)

In determining the public interest under Section 15 of the Shipping Act, 1916, the Commission has thus disregarded the will of Congress, and has erred as a matter of law by basing its conclusion on improper factors and disregarding the factors that should properly be considered.

The Commission should have concluded that the equalization rules and practices are contrary to the public interest, in violation of Section 15 of the Shipping Act, 1916, because they are detrimental to the Port of Stockton and to ocean carriers which serve or desire to serve Stockton.

c. Impropriety of Disregarding Section 8 of Merchant Marine Act, 1920.

Perhaps brief comment should be made concerning the contention of our opponents that Section 8 of the Merchant Marine Act, 1920, should be disregarded because, they contend, the functions specified in such Section 8 were not specifically transferred to the Commission under Section 103 of Reorganization Plan No. 7 of 1961 (75 Stat. 840, 46 U.S.C.A. 1111 note), when the Federal Maritime Administration and the Federal Maritime Commission were separated.

Section 8 of the Merchant Marine Act, 1920, remained part of the law of the land, and the policy expressed therein continued to be the policy of Congress. Even if it were no longer required to make the investigations specified in Section 8, the Federal Maritime Commission cannot properly ignore the policy of Congress expressed in that section and—as it has done here—take action directly contrary to the Congressional policy expressed therein.

III.

VIOLATION OF SECTION 205 OF MERCHANT MARINE ACT, 1936

Section 205 of the Merchant Marine Act, 1936, (46 U.S.C. 1115), provides as follows:

> "Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it."

In its Report the Commission has found:

> "* * * Stockton is a port designed for the accommodation of ocean-going vessels, located on an improvement authorized by the Congress, and is therefore entitled to the protection of Section 205, as our predecessor said of the Port of Stockton and other bay area ports in *Encinal Terminals v. Pacific Westbound Conference,* 5 F.M.B. 316, 320 (1957). * * *" (Com. Rep. 22, R. 1287.)

The Commission has also found

> "* * * Although equalization is optional under the tariff, *carriers find that competition compels them to equalize.*" (Com. Rep. 8, R. 1273. Emphasis supplied.)

This means that a Conference carrier whose managerial judgment would lead it to serve the Port of Stockton by

sending its vessel to Stockton to load cargo, is compelled, in order to meet the competition of other Conference carriers, to refrain from sending its vessel to Stockton, and instead of serving Stockton, to load the cargo at another port, such as San Francisco, and rebate, through port equalization, the difference between the inland transportation charges to the port of loading and the lower inland transportation charges to Stockton.

By reason of the Conference equalization rule, and the practice of the Conference members thereunder, a carrier which would otherwise send its vessel to Stockton is prevented from serving Stockton because of the necessity of meeting the competition of other carriers which handle the cargo over San Francisco by means of port equalization.

The Conference equalization rule, and the action of the Conference carriers, have therefore prevented another common carrier by water from serving Stockton—in clear violation of Section 205 of the Merchant Marine Act, 1936, which is quoted immediately hereinabove.

The Commission should have concluded that the port equalization rules set forth in the Conference tariff pursuant to the agreement of the Conference carriers, and the actions of such carriers under those rules, are unlawful because they result in violations of Section 205 of the Merchant Marine Act, 1936.

Here, again, whether such Section 205 was specifically mentioned in Reorganization Plan No. 7 of 1961 (75 Stat. 840, 46 U.S.C.A. 1111 note) in connection with the functions transferred to the Commission is immaterial, since that section is part of the law of the land and the action of the Commission must be in conformity therewith.

IV.

UNLAWFUL REBATES RESULTING FROM THE EQUALIZATION RULES AND PRACTICES

Another ground of unlawfulness of the respondent Conferences' equalization rules and practices is that they result in unlawful rebates, in violation of Section 16 (Second) of the Shipping Act, 1916, (46 U.S.C. 815).

The Commission has found that some of the cargo which moved over San Francisco from an area where the inland transportation charges were lower to Stockton than to San Francisco, and on which the Conference carriers absorbed the difference between the inland transportation charges to Stockton and to San Francisco, would have moved over the Port of San Francisco without any such absorption of inland transportation charges. In this respect the Commission found:

> (a) "If there were no equalization, many perishable commodities would still move through San Francisco rather than Stockton". (Com. Rep. 8, R. 1273.)
>
> (b) "not all the equalized cargo would have gone to Stockton but for equalization". (Com. Rep. 14, R. 1279.)

These were instances where, for some special reason, such as using a particular steamship line or desiring the last port of loading, a shipper would have paid higher inland transportation charges to load his cargo at San Francisco without any port equalization payments by the ocean carrier.

In such a situation the payment by the ocean carrier of part of the shipper's inland transportation charges is a purely unnecessary gratuitous rebate.

Section 16 (Second) of the Shipping Act, 1916, which is quoted in Appendix B hereof, provides that it is unlawful for any common carrier by water to allow any person to

obtain transportation for property at less than the regular rates or charges of such carrier by any unjust or unfair device or means.

It has been held that the buying and furnishing of storage by an ocean carrier for its shipper or consignee at a port is an unlawful rebate, in violation of such Section 16 (Second). (*Investigation of Storage Practices of Pacific Far East Line, Inc., et al.*, 6 F.M.B. 301 (1961).) Similarly, the payment by the ocean carrier of part of the shipper's inland transportation charges to San Francisco when the shipper would have moved his cargo to San Francisco without such payment is an unlawful rebate, in violation of Section 16 (Second) of the Shipping Act, 1916.

The Commission therefore erred as a matter of law in failing to find that the equalization rules and practices are unlawful on this additional ground.

V.

UNFAIRNESS, UNJUST DISCRIMINATION AND UNDUE PREJUDICE AGAINST THE PORT OF STOCKTON

The majority of the Commission has taken an involved approach in reaching the conclusion that the equalization rules and practices on cargo loaded at a port on San Francisco Bay do not result in unjust discrimination or undue prejudice against the Port of Stockton. Consequently a somewhat extended reply is required in this connection.

Actually there are two very simple approaches which show readily that such equalization rules and practices are unfair, unjustly discriminatory and unduly prejudicial against the Port of Stockton, in violation of Sections 15 and 16 (First) of the Shipping Act, 1916, (46 U.S.C. 814, 815).

In the first place, as we have seen, by paying rebates of part of the inland transportation charges to a San Francisco Bay port, the Conference carriers have diverted cargo from the Port of Stockton and have decreased and discouraged the use of the Port of Stockton by vessels for the handling of cargo. We have also seen that this is directly in violation of the policy of Congress expressed in Section 8 of the Merchant Marine Act, 1920—namely, the policy of encouraging the use by vessels of ports for the handling of cargo that would naturally pass through such ports. The Conference carriers discriminate against, and prejudice, the Port of Stockton by rebating part of the inland transportation charges on cargo shipped to San Francisco, and not making a similar rebate if the cargo is moved to Stockton. Discrimination and prejudice which result in a direct violation of an expressed Congressional policy to the contrary must be held to be "unjust" and "undue" as a matter of law.

In the second place, it should be noted that the second paragraph of Section 15 of the Shipping Act, 1916, provides that the Commission shall cancel or modify any agreement "that it finds to be unjustly discriminatory *or unfair* as between * * * ports". How can it possibly be said that a rebating device which diverts from the Port of Stockton to a San Francisco Bay port cargo which would otherwise move over the Port of Stockton is *fair* to that port? The record obviously will not support a finding that the port equalization under consideration is not "unfair" to the Port of Stockton. The Commission erred in not finding that such port equalization is unfair to the Port of Stockton and in not requiring the cancellation of the equalization rules.

But instead of applying these easy approaches which show clearly unfairness, unjust discrimination and undue prejudice against the Port of Stockton, the Commission has adopted a more complicated approach to this question, which will be discussed next.

The Commission concluded that the respondents' equalization rules which permit equalization against the Port of Stockton on cargo loaded at the Ports of Los Angeles and Long Beach are unjustly discriminatory and unfair between ports within the meaning of Section 15 of the Shipping Act, 1916.* (Com. Rep. 25-27A, R. 1290-93.)

The two grounds specified by the Commission for reaching a different conclusion for equalization against Stockton on cargo loaded at a San Francisco Bay port will be considered separately.

a. "Bay Area" Ports and "Geographical Area".

The Commission first finds a distinction between cargo loaded at Los Angeles and Long Beach and cargo loaded at San Francisco because, according to the Commission, Stockton and San Francisco are both San Francisco "bay area" ports and are hence both in the same "geographical area". (Com. Rep. 12, R. 1277.)

In his dissenting opinion, Commission Hearn has taken violent exception to this attempted distinction between the loading of cargo at Los Angeles and at San Francisco. Commissioner Hearn has correctly declared that Stockton "can in no way be considered a San Francisco Bay area port". (Com. Rep. 27A, R. 1293.) With respect to these distinguishing findings of the majority of the Commission, Commissioner Hearn has stated:

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*Section 15 is applicable because the equalization rules are contained in the Conference tariffs, which constitute agreements between common carriers by water which are subject to Section 15.

"In reaching its ultimate conclusion, the majority found that (1) the port of Stockton is a port in the San Francisco Bay area, and (2) cargoes naturally tributary to Stockton are also naturally tributary to San Francisco. While I think neither of these findings is correct, I believe they skirt and confuse the central issue, which is: Do these tariff rules result in an unjust discrimination to the port of Stockton? The findings, moreover, are not supported by the facts, and have no valid basis in law.

First, the port of Stockton is not a San Francisco Bay port within the meaning of any statute administered by this Commission, and the cited 'comprehensive report' of the California Legislature in 1951 referring to Stockton as a Bay Area port certainly is not controlling here, if indeed it has any relevance at all. The incontrovertible facts are that Stockton is some 107 constructive miles and several distinct waterways moved from San Francisco Bay. It is unthinkable that the Port of Stockton should be considered as juxtaposed to San Francisco, Oakland, Alameda and Richmond. The finding that Stockton should be treated as a San Francisco Bay port must hang as an unwarranted fiction upon which no legal conclusion can be based.

Secondly, to say, as does the majority, that the 'natural direction of the flow of traffic from the San Joaquin Valley . . . is through the Golden Gate to the Pacific Ocean' begs the question. The point at issue is whether the 'natural direction of the flow of traffic from the San Joaquin Valley . . . through the Golden Gate . . .' is through San Francisco or through Stockton. I hold to the belief that this natural flow is through Stockton, and succinctly stated, but for the equalization, an admittedly artificial device, San Joaquin exports would normally flow through the Golden Gate via Stockton, except where, *for the convenience of the cargo,* shippers are not only willing to but should pay

their fair share of costs of the premium service offered at San Francisco." (Com. Rep. 30-31, R. 1296-97.)

The only support indicated by the majority of the Commission for its finding that Stockton and San Francisco are both San Francisco "bay area" ports and are hence both in the same "geographical area" is twofold—first, that "the California Legislature in a comprehensive report on the San Francisco ports issued in 1951 consistently referred to Stockton as a Bay area port" (Com. Rep. 12, R. 1277); and second, that "In setting up the Bay Area Protection and Promotion Program, now contained in *Harbors and Navigation Code,* section 1980, et seq., the San Francisco Bay Area is defined by the California Legislature as—

> '. . . that region served by commercial shipping and transportation passing through the Golden Gate, including tributary areas of central and northern California . . .' " (Com. Rep. 12, R. 1277.)

Obviously, the California Legislature was using the term "San Francisco Bay Area" merely as a term of convenience. The Legislature was not attempting to transpose the San Joaquin Valley, in which Stockton is located, to San Francisco Bay—which of course it could not do by legislative fiat. That the Legislature was merely using a term of convenience is clear from the introductory portion of Section 1980 of the *California Harbors and Navigation Code,* which was omitted in the Commission's Report and which states:

> "*As used in this article,* the 'San Francisco Bay area' means that region served" etc. (Emphasis supplied.)

That this definition of the San Francisco Bay Area is meaningless is apparent from the fact that if anything

moved from Red Bluff, in the upper Sacramento Valley, down the Sacramento River, Red Bluff would be considered part of the San Francisco Bay area—which of course is absurd.

Actually, neither the report of the California Legislature nor the California statute constitutes *"evidence"* showing that, as a matter of *fact,* Stockton is part of the San Francisco Bay Area. Moreover, neither the legislative report nor the California statute was offered in evidence in this proceeding, and neither is part of the record on which the Commission's decision could be based. Section 7 (d) of the Administrative Procedure Act (5 U.S.C. 1006) provides:

> "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision * * *."

Certainly the Legislative Report and the statute cited by the Commission cannot change the fact that Stockton is located in the San Joaquin Valley, 84 miles by water from San Francisco (Rep. Tr. 30, Phelps.) and five waterways removed from San Francisco Bay—by San Pablo Bay, Carquinez Strait, Suisun Bay, the San Joaquin River, and the Stockton Deep Water Channel (Ex. 7).

Since the Commission's finding that Stockton and San Francisco are in the same "geographical area" is based on its finding that both are in the San Francisco Bay area, the finding with respect to the same "geographical area" is likewise unsupported by any evidence. It is well known that Stockton is in the San Joaquin Valley, which is an entirely distinct area from that surrounding San Francisco Bay. This is apparent from the map in evidence as Exhibit No. 4, and especially the relief map in the lower left hand corner of that exhibit, which shows how completely the San Joaquin Valley is separated from San Francisco Bay geographically.

Cargo loaded at San Francisco or any other port located on San Francisco Bay cannot properly be treated differently from cargo loaded at Los Angeles or Long Beach by declaring that Stockton and San Francisco are both "bay area" ports and are both in the same "geographical area".

b. "Naturally" Tributary Territory.

The second ground on which the Commission distinguishes cargo loaded at San Francisco and other San Francisco Bay ports from cargo loaded at Los Angeles and Long Beach is that the territory which is "naturally" tributary to Stockton is also "naturally" tributary to San Francisco and other ports on San Francisco Bay. (Com. Rep. 16, R. 1281.)

In reaching this conclusion the Commission has completely overlooked the meaning and application of port equalization, and the provisions of the Conference equalization rules here involved. Under the principles of port equalization and the terms of such rules, it is impossible to have an area "naturally tributary" to two different ports in a situation where port equalization is applied.

The very function and purpose of port equalization is to prevent cargo from moving over a port *over which it would otherwise move,* and to load it over another port to which the inland transportation charges are higher than to the port over which the cargo would otherwise move. If the cargo would move over the more distant port at which it was actually loaded without the absorption by the ocean carrier of the additional inland transportation charges, *then there would be no need or justification for port equalization on such cargo. This is recognized by the Conference equalization rules here involved, which limit the application of port equalization to the following situation:*

"* * * cargo *which would normally move* from one California terminal port, may be shipped under equalization via another California terminal port."* (See paragraph (e) of Appendix A hereto.) (Emphasis supplied.)

The Conference equalization rules themselves, therefore, limit the making of port equalization payments to situations where otherwise the cargo would normally move over another port. Relating this to the ports of Stockton and San Francisco, this means that port equalization payments on cargo loaded at San Francisco can only be made in instances where without such equalization payments the cargo "would normally move" over the Port of Stockton. Obviously, if the cargo would otherwise normally move over the Port of Stockton, this shows that such cargo is "naturally tributary" to the Port of Stockton. If in the absence of port equalization payments it would normally move over the Port of Stockton, such cargo cannot also be "naturally tributary" to San Francisco.

The result, therefore, is that on all cargo loaded at San Francisco on which port equalization is permitted under the Conference rules, all of such cargo would otherwise normally move over the Port of Stockton, and hence is "naturally tributary" to Stockton, and not to San Francisco. The area from which such cargo moves, therefore, is "naturally tributary" to Stockton and not to San Francisco.

Actually, the record shows that cargo from the entire San Joaquin Valley in California would normally move over the

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*Rule No. 5 of the Pacific Westbound Conference Tariff shows that the following ports in California are terminal ports in that Conference: San Diego, Los Angeles Harbor, Long Beach, San Francisco, Alameda, Oakland, Richmond, Stockton and Sacramento. (Ex. 1-C.) The terminal ports in California are the same in the Pacific Straits and Pacific/Indonesian Conferences, except that Sacramento is not a terminal port in those Conferences. (Ex. 2-A, 3-A.)

Port of Stockton in the absence of port equalization because the inland transportation charges are lower from that area to the Port of Stockton than to any other port (Rep. Tr. 731, Rollins; Ex. 4, 10, 30, 32, 33, 34). The San Joaquin Valley area, therefore, is "naturally tributary" to the Port of Stockton, and not to San Francisco or any other port located on San Francisco Bay.

The Commission has completely overlooked the fact that under the Conference rules themselves, in no instance where port equalization is permitted can such cargo be "naturally tributary" to more than one port—namely, the port over which it would normally have moved in the absence of such equalization. *The Commission's finding that the area which is "naturally tributary" to the Port of Stockton is also "naturally tributary" to San Francisco is therefore directly contrary to the Conferences' own rules and wholly without support in the record.*

To the extent that any cargo on which the inland transportation charges are lower to Stockton than to San Francisco would move via San Francisco without the port equalization payments, the movement via San Francisco would be for some peculiar reason of the shipper, such as the desire of the consignee for the use of a particular vessel that did not call at Stockton, and it could not be said to be a "natural" movement or to make the area "naturally tributary" to San Francisco. Actually in such a situation the making of port equalization payments would be improper under the Conference rules because the cargo would not "normally move" over the Port of Stockton. Moreover, as we have seen, the making of a port equalization payment in such a situation would be a clear rebate because the cargo would have moved over San Francisco without such payment, and the equalization payment is a pure gratuity to the shipper of part of the transportation charges that he would otherwise pay.

On what does the Commission rely in support of its finding that the territory which is naturally tributary to Stockton is also naturally tributary to San Francisco?

First, that the natural flow of traffic from the San Joaquin Valley is through the Golden Gate. (Com. Rep. 13, R. 1278.) As Commissioner Hearn has pointed out in the portion of his dissenting opinion which is quoted hereinabove, this does not show whether the "natural flow" is over the Port of Stockton or over the Port of San Francisco, which is the question.

Second, the Commission states that before Stockton became accessible to oceangoing vessels, San Francisco was the principal port for San Joaquin Valley freight and it did not cease to be such a port merely upon the creation of an additional port at Stockton. (Com. Rep. 13, R. 1278.) This statement is entirely unsupported by, and directly contrary to, the record and other findings of the Commission. The Conference rules make port equalization applicable only when such cargo would otherwise normally move over the Port of Stockton. As pointed out hereinabove, the record shows that cargo from the San Joaquin Valley would normally move over the Port of Stockton because of lower inland transportation charges to that port. The fact is that San Francisco's picture changed when cargo from the San Joaquin Valley could move over the Port of Stockton. Thereafter the movement of most of such cargo could be forced over the Port of San Francisco only by means of the equalization payments. This completely refutes the Commission's finding that the San Joaquin Valley is "naturally tributary" to San Francisco, as well as to Stockton.

Finally, in finding that the territory which is "naturally tributary" to Stockton is also "naturally tributary" to San Francisco, the Commission refers to a publication of the

Maritime Administration and the Army Engineers which purports to describe the "Tributary Territory" of various ports, the "Tributary Territory" described for Stockton being within that described for San Francisco and certain other San Francisco Bay ports. (Com. Rep. 15-16, R. 1280-81.) The publication cited by the Commission does not purport to describe the "naturally" tributary territory of the respective ports in the sense of the territory from which cargo would *normally move* over a particular port. Such publication merely refers to the territory from which the respective ports obtain some of their traffic. The fact that some shippers would be willing to pay a premium in inland transportation charges to reach a more distant port, for some reason peculiar to such shipper, does not show that the territory is "naturally" tributary to the more distant port. That the term "naturally tributary" territory has been used in port equalization decisions as meaning the area from which the inland transportation rates and the distances are lower to a particular port than to any other port is apparent from the following language in the case of *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664:

> "* * * cargoes on which absorptions of inland freight charges are made originate in areas naturally and geographically tributary to Northwest points *because of inland transportation rates favorable to those ports as well as through closer proximity* * * *." (Page 675. Emphasis supplied.)

The term "tributary territory" was certainly not used in this sense in the publication cited by the Commission. The record shows that from the San Joaquin Valley area the inland transportation rates and the distances are less to Stockton than to San Francisco. (Rep. Tr. 731, Rollins; Ex. 4, 10, 30, 32, 33, 34.) Applying the test of "naturally

tributary" specified in the *City of Portland* case, supra, therefore, the San Joaquin Valley area—which is "naturally tributary" to Stockton—cannot possibly also be "naturally tributary" to San Francisco. The Commission's finding to the contrary is unsupported by substantial evidence.

In connection with its finding that the territory naturally tributary to Stockton is also naturally tributary to San Francisco, the Commission adds that "the territory surrounding Stockton and the entire Bay area is centrally, economically and naturally served by the conference facilities at San Francisco". (Com. Rep. 16, R. 1281.) This merely begs the question, which is whether the territory surrounding Stockton and the San Joaquin Valley may *lawfully* be served by the conference facilities at San Francisco by means of port equalization. Moreover, as we have pointed out, serving the San Joaquin Valley through San Francisco by means of port equalization cannot possibly be said to be serving it "naturally", and there is no evidence in the record to support such a finding.

Summarizing briefly, the Commission has endeavored to distinguish cargo loaded at Los Angeles and Long Beach from cargo loaded at San Francisco or any other port on San Francisco Bay on the grounds that Stockton and San Francisco are both in the San Francisco "bay area" and hence both in the same "geographical area", and that the territory which is "naturally tributary" to Stockton is also "naturally tributary" to San Francisco. We have seen that neither of these grounds is supported by substantial evidence in this proceeding. The Commission concluded that port equalization against Stockton on cargo loaded at Los Angeles and Long Beach was unlawful because it diverted from Stockton cargo that would otherwise move over that port. Since port equalization on cargo loaded at San Francisco or any other port on San Francisco Bay diverts from

Stockton cargo that would otherwise move over that port, the Commission should likewise have held that port equalization against Stockton on cargo moving over a port on San Francisco Bay is unlawful.

Actually, however, for a determination of whether the port equalization in question is unlawful, it is wholly immaterial whether Stockton and San Francisco are said to be both in the same "geographical area", and whether the territory which is "naturally tributary" to Stockton is said to be also "naturally tributary" to San Francisco. This aspect will be considered next.

c. Immateriality of Same "Geographical Area" and Same "Naturally Tributary Territory".

The term "geographical area" has no precise limitations. There are varying degrees of geographical areas. It is possible to consider as a single "geographical area" all of California north of the Tehachapi Mountains, or even all of California, the entire Pacific Coast, or the Pacific Slope west of the Rocky Mountains. Consequently, to say that Stockton and San Francisco are in the same "geographical area" is meaningless with respect to the issue in this proceeding.

Similarly, the term "naturally tributary" territory can be used with different meanings. We have pointed out that in its Report here involved, the Commission has not used that term in accordance with its meaning in other port equalization decisions.

This case cannot be decided properly on the basis of meaningless terminology. It must be decided on the basis of applicable principles of law, which the Commission did not do. A difference in mileage from the origin of the cargo to the loading port (from Fresno to Los Angeles versus to San Francisco) obviously does not justify the application

of different principles of law in connection with port equalization against the Port of Stockton.

In order to determine whether respondents' port equalization on cargo loaded at San Francisco or any other port on San Francisco Bay results in unjust discrimination and undue prejudice against the Port of Stockton, in violation of Sections 15 and 16 (First) of the Shipping Act, 1916, it is necessary to determine whether such port equalization diverts from Stockton cargo which would otherwise move over that port. This principle has been stated briefly as follows by the Commission's predecessor in *City of Mobile v. Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941):

> "To permit continuation of unrestricted solicitation by carriers for business through condonation of a practice whereby unfavorable inland rates are overcome would wholly ignore the right of a port to traffic to which it may be entitled by reason of its geographical location. Such right appears fundamental under statutes designed to establish and maintain ports. * * *" (Page 486.)*

The same principle was followed in *Beaumont Port Commission v. Seatrain Lines, Inc.*, 3 F.M.B. 556 (1951), wherein the following conclusion was reached:

> "* * * We find that a drawing away of traffic from the Gulf ports results in undue prejudice and is due to the individual act of respondent in establishing its equalization practice. * * *" (Page 566.)

In the case of *City of Portland v. Pacific Westbound Conference*, 4 F.M.B. 664 (1955), the Federal Maritime Board found the equalization rule and practices of the Pacific Westbound Conference to be unjustly discriminatory and unfair between ports within the meaning of Section 15 of

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*This quotation was cited and followed as recently as 1960 in *Proportional Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960).

the Shipping Act, 1916, on the basis of evidence which it summarized as follows:

> "In support of their allegations of discrimination and preference, the complaining ports have adduced evidence showing or tending to show that (a) competition exists between Pacific Northwest ports and the port of San Francisco for the same commodities; (b) diversions of traffic are effected by conference carriers through absorptions of inland transportation charges on shipments from San Francisco on cargo originating in Northwest producing areas; (c) cargoes on which absorptions of inland freight charges are made originate in areas naturally and geographically tributary to Northwest points because of inland transportation rates favorable to those ports as well as through closer proximity; and (d) the conference equalization rule has proximately caused a substantial loss of cargo to Northwest ports." (Pages 674-675.)

In the *City of Portland* case, supra, the Board also declared:

> "* * * To the extent, therefore, that the ports of a given geographical area give or can give adequate transportation services, we look with disfavor on equalization rules or practices which divert traffic away from the natural direction of the flow of traffic." (Page 679.)

The Port of Stockton is an entirely separate and independent port, and is entitled to have these principles applied to it regardless of whether, as a result of the rebating of inland transportation charges, the cargo is loaded on the ocean vessel at Los Angeles or San Francisco.

The respondent Conferences have themselves recognized that the Port of Stockton is an entirely separate and distinct port. Their tariffs name Stockton as a "terminal port" entirely separate and distinct from ports located on San Francisco Bay which are designated "terminal ports". (Ex.

1-C, 2-A, 3-A.) A "terminal port" is a port from which the regular Conference freight rates apply without restriction.

In various cases before them, the Commission's predecessors have also recognized Stockton as a port entirely separate and distinct from ports on San Francisco Bay. See, for example, *Sun-Maid Raisin Growers Association v. Blue Star Line, Ltd.*, 2 U.S.M.C. 31 (1939), and *Encinal Terminals et al. v. Pacific Westbound Conference et al.*, 5 F.M.B. 316 (1957). As a matter of fact, in both of those cases the Conferences and even the Port of San Francisco argued that the Port of Stockton was so completely separate and distinct from the Port of San Francisco that different rates and rules should apply at Stockton from what applied at San Francisco.

It should be noted how completely the evidence in this case with respect to cargo equalized against Stockton and loaded at San Francisco resembles the evidence in the *City of Portland* case, supra, on the basis of which the Federal Maritime Board held that the port equalization there involved was unjustly discriminatory between ports and hence unlawful. (See the quotation from the *City of Portland* case on page 39, supra.) Here the Commission's Report shows that (a) competition exists between Stockton and San Francisco for the same commodities; (b) diversions of traffic are effected by Conference carriers through absorptions of inland transportation charges on shipments from San Francisco on cargo originating in the San Joaquin Valley; (c) such cargoes originate in an area naturally and geographically tributary to the Port of Stockton because of inland transportation rates favorable to Stockton, as well as through closer proximity to Stockton; and (d) the Conference equalization rules have proximately caused a substantial loss of cargo to the Port of Stockton.

The conclusion of the Board in the *City of Portland* case that under these circumstances the port equalization was

unjustly discriminatory and unduly prejudicial between ports was affirmed by the United States Court of Appeals in the case of *Pacific Far East Line v. United States,* 246 F.(2d) 711 (C.A., D.C. 1957). The Port of Stockton is entitled to have a similar holding in this case on the basis of such evidence—namely, that port equalization against Stockton on cargo loaded at San Francisco or any other port on San Francisco Bay is unjustly discriminatory and unduly prejudicial between ports and hence unlawful, in violation of Sections 15 and 16 (First) of the Shipping Act, 1916.

Perhaps a brief comment should be made with respect to the language of the *City of Portland* case concerning adequacy of service at the port equalized against. In our case the Commission has not made any finding that port equalization on cargo loaded at San Francisco is justified by inadequacy of service at Stockton. Consequently, such equalization cannot be justified on the ground of inadequacy of service at Stockton. Actually, inadequacy of service at Stockton could not be a proper ground of justification of the equalization, because any inadequacy of service at Stockton would result directly from the action of the Conference members in refusing to serve Stockton, and could not properly be charged against the Port of Stockton.

On what, then, does the Commission attempt to justify reaching a different conclusion in our case on evidence similar to that on which unjust discrimination was found in the *City of Portland* case? On the basis of the decision of the former Maritime Commission in *Beaumont Port Commission v. Seatrain Lines, Inc.,* 2 U.S.M.C. 699 (1943). (Com. Rep. 12-13, 15, R. 1277-78, 1280.) In that case the Commission's predecessor permitted equalization against Houston and Galveston, Texas, on cargo loaded by Seatrain Lines at Texas City, but it held that equalization of Texas

City with Beaumont, Texas, by absorption of inland transportation charges was unlawful. The Commission's predecessor found that in a geographical sense Texas City, Galveston and Houston "may be described as Galveston Bay ports" (page 702), but that "Beaumont is an inland port" (page 702).

Because the Commission concluded that Stockton and San Francisco are both "bay area" ports and hence in the same "geographical area", it held that the *Beaumont* case indicated that port equalization was proper between Stockton and San Francisco just as it had been permitted in the case of Texas City, Galveston and Houston. This conclusion is improper because, as we have seen, Stockton and San Francisco are not both in the same geographical area. Actually, Stockton occupies a position similar to Beaumont —both being inland ports—and consequently a proper application of the *Beaumont* case leads to the conclusion that equalization between San Francisco and Stockton is unlawful.

Moreover, certain unique facts in the *Beaumont* case make that decision valueless as a matter of general principle. In the first place, the carrier involved there—Seatrain Lines—transported railroad freight cars on its vessels and it could not load the railroad cars on its vessels at an ordinary pier, but required special expensive facilities. The handling of this traffic over Texas City, where the required special facilities existed, avoided the necessity of constructing expensive facilities at Galveston and Houston. There is no such element involved in our case, since the freight here involved can be loaded over the regular docks of a port.

Also, another distinguishing feature of the *Beaumont* case was that no discrimination or injury could be shown from Seatrain's port equalization practice since Galveston

and Houston were not in a position to handle the Seatrain traffic because they lacked the special facilities required. In this connection the Commission said in the *Beaumont* case, referring to Galveston and Houston:

> "* * * The owners of wharf facilities at these ports will lose revenue as a result of the use of Seatrain's facilities, but that loss would be suffered even if Seatrain operated from Galveston and Houston, because none of the wharfingers there provides the peculiar facilities required by Seatrain's operations." (2 U.S. M.C. 703.)

Our situation is completely different with respect to the matter of discrimination, since, as we have seen, the equalization practices here involved deprive the Port of Stockton of cargo and revenue that it would otherwise receive. Consequently, the equalization rules and practices in our case result in discrimination in fact against Stockton—which was not true with respect to Galveston and Houston in the *Beaumont* case.

The *Beaumont* case, therefore, cannot properly be said to show that the equalization rules and practices here involved are not unjustly discriminatory against Stockton on cargo that is equalized over San Francisco. Such practices interfere with the normal movement of cargo over the port to which the inland rates are the lowest from the point of origin of the cargo. Stockton is entitled to be treated as a separate and distinct port. The principle of the other equalization cases cited hereinabove, and of the *Beaumont* decision with respect to Beaumont, is applicable in our case—namely, that port equalization which interferes with the normal movement of cargo results in unjust discrimination between ports and is unlawful.

Commissioner Hearn has set forth the correct principles of law which should be applied in determining whether the

port equalization here involved results in unjust discrimination and undue prejudice against the Port of Stockton on cargo loaded at San Francisco or any other port on San Francisco Bay. In his dissenting opinion he says:

> "The only valid test, in this case, for determining whether or not the effectuation of the equalization rule, and consequently for determining whether respondents are giving 'any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic' or subjecting 'any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage' in violation of Section 16 First, is whether the traffic would move via San Francisco *but for* the equalization. Here, certainly, most of it *would not* and to the extent that the artificial device draws traffic from Stockton it is unlawful.
>
> In this vein, I am convinced that the precedents support my view. There can be no doubt here that the equalized cargoes originate in areas 'naturally and geographically tributary (to Stockton) because of inland transportation rates favorable to (Stockton) as well as through closer proximity'. *City of Portland v. Pacific Westbound Conference,* 4 F.M.B. 664 (1955). Similarly, what was said in *City of Mobile v. Baltimore Insular Line, Inc.,* 2 U.S.M.C. 474 (1941), is appropriate here:
>
> 'To permit continuation of unrestricted solicitation by carriers for business through condonation of a practice whereby unfavorable inland rates are overcome would wholly ignore the right of a port to traffic which it may be entitled by reason of its geographical location. Such right appears fundamental under statutes designed to establish and maintain ports'.

Again, in the *Portland* case, *supra,* our predecessors interpreted section 8 of the Merchant Marine Act, 1920, as requiring:

> '. . . that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area'.
>
> Moreover, the second Beaumont case at 2 U.S.M.C. 699 (1943), so heavily relied upon by the majority, is inappropriate here. * * *" (Com. Rep. 32-33, R. 1298-99.)

The Commission's conclusion that the equalization rules and practices here involved are not unjustly discriminatory or unduly prejudicial against the Port of Stockton on cargo loaded at San Francisco or any other port on San Francisco Bay is based on findings which are unsupported by substantial evidence, a misapplication of the *Beaumont* case, and the failure to apply the correct principles of law.

VI.

REMOVAL OF LANGUAGE "WHICH WOULD NORMALLY MOVE" FROM EQUALIZATION RULE

We have pointed out that the port equalization rule of each of the three Conferences here involved permits equalization over a California terminal port only with respect to "cargo which would normally move" over another California terminal port. (See paragraph (e) of Appendix A of this Brief.) This means that cargo can be equalized against the Port of Stockton and loaded over the Port of San Francisco only if without the equalization it would normally move over the Port of Stockton.

The Commission concludes in its Report that the language "which would normally move" should be removed from the equalization rule (Com. Rep. 23, R. 1288), and it so orders in its Order under consideration (R. 1301, 1305). The result of this is that a Conference carrier may, and does, load cargo at San Francisco on which it rebates to the shipper

the difference between his inland transportation charges to San Francisco and to Stockton even though the cargo would have moved over San Francisco without such payment of inland transportation charges by the ocean carrier. It will be recalled that the Commission found that there is such cargo—more specifically the Commission found that "If there were no equalization, many perishable commodities would still move through San Francisco rather than Stockton" (Com. Rep. 8, R. 1273), and that "not all the equalized cargo would have gone to Stockton but for equalization" (Com. Rep. 14, R. 1279).

As we pointed out in Section IV of our argument hereinabove, the payment to a shipper by an ocean carrier of the difference between the shipper's higher inland transportation charges to San Francisco and his lower charges to Stockton is clearly an unnecessary gratuitous rebate, in violation of Section 16 (Second) of the Shipping Act, 1916, when the shipper would have paid the higher inland charges to move the cargo via San Francisco without such payment of part of the inland transportation charges by the ocean carrier.

The Commission's conclusion that the language of the Conference rule restricting equalization to cargo "which would normally move" over a particular port should be eliminated from the rule is a wholly unwarranted attempt to read a clear restriction out of the rule on the basis of an entirely unsupported assumption that something other than the clear meaning was intended. In this connection the Commission said with respect to the restriction of the operation of the equalization rule to cargo "which would normally move" over another port:

> "* * * This apparent restriction has no practical relation to the theory or operation of the rule. Perhaps

> it was originally intended to make it clear that cargo may be equalized even though it might 'normally' move from another port, thus anticipating any objection on that ground. The rule should be drafted to exclude what is clearly not intended as a restriction. * * *" (Com. Rep. 23, R. 1288.)

There is no support in the record for the Commission's finding that the language "which would normally move" was not intended as a restriction. Moreover, the statements quoted immediately hereinabove show a clear abuse of discretion and a complete lack of comprehension of port equalization by the Commission. Unless certain cargo would normally move over another port, such as Stockton, there would be absolutely no excuse or justification for the absorption by an ocean carrier of the difference between the shipper's inland transportation charges to such port and to a more distant port, such as San Francisco, over which the cargo would have moved without such absorption.

The Commission's interpretation of the Conference tariffs with respect to the restriction "which would normally move" over certain ports is clearly erroneous. Where, as here, the words of a tariff are used in their ordinary sense, the construction of the tariff presents solely a question of law which should be decided by the courts. (*Great Northern Railway Company v. Merchants Elevator Company,* 259 U.S. 285, 66 L. Ed. 943, 42 Sup. Ct. 477.) The Court should therefore construe the tariff on the basis of the language used therein, and should require that this restriction be given effect in accordance with its clear terms.

The Commission committed a serious error in ordering that the language "which would normally move" should be eliminated from the rule. Instead, the Commission should have admonished the respondents in the proceeding before

the Commission that, as the rule clearly specifies, port equalization should be applied only in instances where the cargo would normally move over another port.

VII.

VIOLATION OF FIFTH AMENDMENT

For the reasons which are explained in our discussion set forth hereinabove, the Commission's order unlawfully permits the Conference carriers to divert from the Port of Stockton, by means of port equalization against that port, cargo that would otherwise move over the Port of Stockton, resulting in the loss by that port of revenue that would otherwise accrue to it from terminal charges for handling the cargo.

By failing to prohibit such unlawful port equalization and permitting such diversion of cargo from the Port of Stockton, the Commission's order deprives petitioner Stockton Port District of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

VIII.

SUMMARY OF GROUNDS OF REVERSIBLE ERROR

This Court is charged with the duty of holding unlawful, and setting aside, an order of an administrative agency such as the Federal Maritime Commission, if the order is (1) based on findings which are unsupported by substantial evidence, (2) based on an error of law, (3) unsupported by adequate findings, or (4) arbitrary or an abuse of the agency's discretion or power. (Administrative Procedure Act, Section 10(e), (5 U.S.C. 1009); *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 227 U.S. 88, 57 L. Ed. 431, 33 Sup. Ct. 185; *Universal Cam-*

era Corporation v. Board, 340 U.S. 474, 95 L. Ed. 456, 71 Sup. Ct. 456; *Morgan v. United States,* 298 U.S. 468, 80 L. Ed. 1288, 56 Sup. Ct. 906; *Interstate Commerce Commission v. Mechling,* 330 U.S. 567, 91 L. Ed. 1102, 67 Sup. Ct. 894; *Interstate Commerce Commission v. James McWilliams Blue Line, Inc.,* 100 F. Supp. 66, 342 U.S. 951, 96 L. Ed. 707, 72 Sup. Ct. 624; *Mitchell v. United States,* 313 U.S. 80, 85 L. Ed. 1201, 61 Sup. Ct. 873; *Henderson v. United States,* 339 U.S. 816, 94 L. Ed. 943, 42 Sup. Ct. 477.) Upon review, the Court is likewise required to "decide all relevant questions of law, interpret constitutional and statutory provisions". (Administration Procedure Act, Section 10(e), 5 U.S.C. 1009.)

The Commission's Order here under consideration is erroneous on all of the grounds hereinabove specified.

In attempting to distinguish the legal effect of equalized cargo loaded at Los Angeles and Long Beach, and at San Francisco and other San Francisco Bay ports, the Commission has relied on findings pertaining to the "same geographical area" and "naturally tributary territory" which are unsupported by substantial evidence. The Commission's conclusion that the language "which would normally move" should be eliminated from the equalization rule is likewise based on findings which are unsupported by substantial evidence.

The Commission's Order is based on errors of law in that the Commission applied erroneous and improper principles of law in concluding that port equalization against the Port of Stockton on cargo loaded at San Francisco or any other port located on San Francisco Bay (1) does not violate the policy of Section 8 of the Merchant Marine Act, 1920, (2) is not contrary to the public interest, in violation of Section 15 of the Shipping Act, 1916, (3) does not violate Section 205 of the Merchant Marine Act, 1936, (4) does

not result in unlawful rebates, in violation of Section 16 (Second) of the Shipping Act, 1916, and (5) does not result in unfairness, unjust discrimination and undue prejudice against the Port of Stockton. The Commission's Order directing that the language "which would normally move" be eliminated from the equalization rules is likewise based on errors of law.

The Commission's conclusions distinguishing between cargo loaded at Los Angeles and Long Beach and at San Francisco and other ports on San Francisco Bay, and its conclusion of lack of unjust discrimination and undue prejudice against the Port of Stockton, are unsupported by adequate findings.

The Commission's Order also deprives petitioner of its property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

The conclusions of the Commission on each of the points hereinabove mentioned are arbitrary and an abuse of the Commission's discretion and power.

In his dissenting opinion, Commisioner Hearn has appraised the conclusions of the majority as follows:

> "I disagree, however, with the results reached by the majority and am convinced that the subject equalization rules against Stockton are violative of Section 16 (First) of the Shipping Act, contrary to the public interest standard of Section 15, and in contravention of the principles and policies of Section 8 of the Merchant Marine Act, 1920, and Section 205 of the Merchant Marine Act, 1936.
>
> I read the majority's action today as (1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers, the right to determine which of our ports shall prosper and which shall suffer. * * *" (Com. Rep. 27A-28, R. 1293-94.)

We commend Commissioner Hearn's dissenting opinion (Com. Rep. 27A-33, R. 1293-99) to the Court for a correct statement of the principles of law on various points which the majority of the Commission decided erroneously.

IX.

CONCLUSION

The power to determine which ports in the United States shall prosper and which shall have cargo that would otherwise move over them diverted to other ports should not be placed in the hands of conference carriers, and even foreign steamship lines. Surely artificial devices in the form of rebates of part of the inland transportation charges should not be sanctioned to divert cargo from its normal course—especially in the face of the expressed policy of Congress to encourage the use by vessels of ports for handling cargo that would naturally move through such ports.

The Port of Stockton has the right to compete with other ports on the basis of the natural conditions confronting each port, without artificial devices in the form of rebates to draw traffic away from it to a competing port.

The Court should reverse the Commission's conclusion that port equalization against the Port of Stockton on cargo loaded at San Francisco or any other port located on San Francisco Bay is lawful.

The Court should hold that the findings hereinabove specified are unsupported by substantial evidence, and that when correct principles of law are applied in conjunction with the unchallenged findings of fact and conclusions in the majority Report, port equalization on such cargo results in (1) a violation of the policy of Section 8 of the Merchant Marine Act, 1920, (2) a violation of Section 15

of the Shipping Act, 1916, in that such port equalization is contrary to the public interest, (3) a violation of Section 205 of the Merchant Marine Act, 1936, (4) unlawful rebates in violation of Section 16 (Second) of the Shipping Act, 1916, and (5) unfairness and unjust discrimination and undue prejudice against the Port of Stockton in violation of Sections 15 and 16 (First) of the Shipping Act, 1916.

The Commission's Order should be declared invalid, permanently enjoined and set aside to the extent that it orders the respondents before the Commission to omit from their rules the characterization of cargo as that "which would normally move" from certain ports, and to the extent that it fails to order the respondents before the Commission (a) to cease and desist from applying their equalization rules to cargo equalized against the Port of Stockton and loaded at San Francisco or any other port located on San Francisco Bay, and (b) to modify their equalization rules to exclude their application to cargo loaded at such ports.

This case should be remanded to the Commission with instructions to revise its Order in accordance with the immediately preceding paragraph. (See *Mitchell v. United States,* 313 U.S. 80, 85 L. Ed. 1201, 61 Sup. Ct. 873; *Henderson v. United States,* 339 U.S. 816, 94 L. Ed. 1302, 70 Sup. Ct. 843.)

Respectfully submitted,

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Dated: June 22, 1966

Certificate of Counsel and of Service

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

I further certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing, by air mail, postage prepaid, three copies to Walter Mayo III, attorney for the respondents, and one copy to Irwin A. Seibel, Attorney, Department of Justice, and by mailing a copy thereof, by regular first-class mail, postage prepaid, to Edward D. Ransom, attorney for interveners Pacific Westbound Conference and its members, Leonard G. James, attorney for interveners Pacific Straits Conference and Pacific/Indonesian Conference and their members, and Miss Miriam E. Wolff, attorney for intervener San Francisco Port Authority.

Dated at San Francisco, California, June 22, 1966.

J. Richard Townsend
(J. Richard Townsend)
Attorney for Petitioner
Stockton Port District

(Appendices A, B and C Follow)

APPENDIX A

Rule No. 2 of Pacific Westbound Conference

(As set forth in Appendix A of Report of Federal Maritime Commission in Docket No. 1086)

(The "Equalization rule", so far as it relates particularly to the Port of Stockton, is underlined.)

Subject to Rules 5, 7 & 9, rates are based on direct loading at Conference terminal loading ports or docks. However, individual member lines may, in lieu of a direct call, absorb the cost of transhipment between terminal ports; or between terminal ports and non-terminal ports; also between non-terminal ports. Reference to non-terminal port absorption applies only if the non-terminal ports have the required minimum tonnage as specified in Rule No. 9, or elsewhere in this tariff. Carriers may equalize between terminal ports only from point of origin, as provided and subject to the limitations set forth herein.[1] Equalization is the absorption by the carrier of the difference between shipper's cost of delivery to ship's tackle at Terminal Dock at nearest conference terminal port and the cost of delivery to ship's tackle at terminal dock and port of equalizing line. Conference terminal ports and docks are those named in Rule No. 5. Conditions and limitations as to equalization follow:

---

1. In the Pacific Straits Conference rule and the Pacific/Indonesian Conference rule, the following appears in lieu of the foregoing four sentences:

> Rates are based on direct loading at loading port or docks, but the individual member line Carriers may meet the competition of other member lines loading direct at terminal ports or docks, either by transhipment or by equalization from point of origin.

Otherwise the rules of the three conferences are substantially the same, insofar as they relate to the Port of Stockton.

(a) Equalization shall not exceed an absorption in excess of 35 percent of the ocean freight, including handling charges and wharfage.

(b) A carrier may not equalize between terminal ports and non-terminal ports, or between non-terminal ports or between docks within a port.

(c) When the inland cost of transportation from point of origin is lower to terminal ports in Oregon, Washington, or British Columbia than via California terminal ports, equalization may be applied via California terminal ports only on shipments of deciduous fruits and dairy products (See Note below covering Explosives) and such equalization shall be permitted only so long as there is not adequate service from the terminal port in Oregon, Washington, or British Columbia, to which the cargo is tributary, to meet the needs of shippers of these commodities.

NOTE: Equalization on explosives is not permitted except that in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing from a terminal through which explosives would normally move at a date which reasonably will meet the needs of such shipper or his consignee, equalization shall be permitted on such shipment, Provided, that the shipper certifies to the Conference the need for space on such date and allows 48 hours after receipt of such certification for the Conference to indicate the conference carriers who can provide space on a direct sailing which reasonably will meet the shipper's needs.

(d) Equalization is permitted on shipments of fresh fruits, which would normally be shipped via California terminal ports when shipped via terminal ports in Oregon, Washington, or British Columbia, when there is not adequate service from the California port, to which the cargo

is tributary, to meet the needs of shippers of these commodities.

(e) Cargo which would normally move from one terminal port in Oregon, Washington, or British Columbia, may be shipped under equalization through another terminal port in Oregon, Washington, or British Columbia, and cargo which would normally move from one California terminal port, may be shipped under equalization via another California terminal port.

(f) Equalization shall only be paid on the basis of the lowest applicable common carrier or contract carrier rates.

(g) In support of each claim for equalization the shipper must furnish the carrier a copy of transportation bill covering movement from point of origin.

(h) Prior to payment of equalization bills, Carriers must submit to the Conference on prescribed form a certified statement for confirmation and approval of applicable interior rates and/or the basis for equalization.

APPENDIX B

Statutes Relied Upon

1.

Section 15 of Shipping Act, 1916 (46 U.S. Code 814)

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. * * *"

2.

Section 16 (First) and (Second) of Shipping Act, 1916 (46 U.S. Code 815)

"* * * * * * *

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

* * * * * * *"

3.

Section 8 of Merchant Marine Act, 1920 (46 U.S. Code 867)

"That it shall be the duty of the board, in cooperation with the Secretary of War, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject

of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided,* That if after such investigation the board shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law."

4.

Section 205 of Merchant Marine Act, 1936 (46 U.S. Code 1115)

"Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent

any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it."

5.

Section 7(d) of Administrative Procedure Act (5 U.S. Code 1006)

"Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

6.

Section 10(e) of Administrative Procedure Act (5 U.S. Code 1009)

"Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction,

authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

7.

Fifth Amendment to Constitution of the United States

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

8.

Sections 2, 3 and 4 of Review Act of 1950 (5 U.S. Code 1032-1034)

"SEC. 2. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * (e) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended, * * *

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

"SEC. 3. The venue of any proceeding under this Act shall be in the judicial circuit wherein is the residence of

the party or any of the parties filing the petition for review, or wherein such party or any of the such parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

"SEC. 4. Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. * * *"

APPENDIX C

Record Reference to Exhibits Offered Before Commission in Docket No. 1086

(Numbers hereinafter set forth indicate pages of Reporter's Transcript before the Commission, which are the same as the pages of the Court Record)

Exhibit No.	Identified	Offered	Received or Rejected*
1	9	10	11
2	13	13	14
3	14	15	15
4	17	58	58
5	23	23	24
6	23	23	24
7	29	29	29
8	36	42	55
9	55	56	56
10	59	61	62
11	68	68	68
12	69	69	70
13	71	72	72
14	72	73	73
15	74	76	76
16	77	80	80
17	83	85	85
18	86	88, 92	88, 92
19	93	95	95
20	96	98	99
21	105	106	106
22	107	108	108
23	109	109	109
24	110	116	116
25	126	126	126
26	170	172	173
27	170	172	173
28	176	177	178
29	242	254	256

*All exhibits offered were received in evidence, except those where the page number shown in this column is in parenthesis, and such exhibits were rejected.

Exhibit No.	Identified	Offered	Received or Rejected*
30	265	291	297
31	267	291	297
32	271	291	297
33	273	291	297
34	274	291	297
35	278	291	297
36	301	301	(334)
37	346	348	353
38	354, 355	Not Offered	
39	354, 355	362	364
40	365	370	375
41	375	376	380
42	509	522	524 (Withdrawn)
43	633	633	634
44	653	661	663
45	653	663	663
46	654	664, 671	671
47	654	673	676
48	655	677	683
49	655		735
50	655	685	686
51	656	687, 701	703
52	656	688	691
53	656	700	701
54	657	706	708
55	657	709	711
56	767	771	771
57	774	776	778
58	837	838	839
59	1,106	1,107	1,108
60	1,112	1,113	1,113
61	1,118	1,119	1,119
62	1,118	1,119	1,119
63	1,140	1,142	1,142
64	1,168	1,171	1,172
65	1,175	1,176	1,177
66	1,183	1,185	1,185
67	1,186	1,188	1,188